No. 88-1847

In The

Supreme Court of the United States

October Term, 1988

FORD MOTOR CREDIT COMPANY

Appellant,

v.

DEPARTMENT OF REVENUE, STATE OF FLORIDA

Appellee.

ON APPEAL FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

JURISDICTIONAL BRIEF OF CATERPILLAR INC., CLARK EQUIPMENT COMPANY, CLARK EQUIPMENT CREDIT CORPORATION, CSX TRANSPORTATION, INC., GENERAL MOTORS ACCEPTANCE CORPORATION, and GENERAL MOTORS CORPORATION Participating As Amici Curiae in Support of Appellant

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QUESTIONS PRESENTED

Appellant, Ford Motor Credit Company, has appealed a decision of the District Court of Appeal of Florida, First District, which held that Florida's intangible property tax does not discriminate against interstate commerce in violation of the Commerce Clause of the United States Constitution. Under its taxing scheme Florida taxes nondomiciled taxpayers on that portion of their intangibles which are generated from Florida sales or from sales which result in property being delivered to a purchaser in Florida. Florida's taxing scheme also taxes all of the intangibles owned by a taxpayer domiciled in Florida. If other states adopted Florida's taxing scheme, there would be multiple taxation of the intangible assets of those taxpayers operating in interstate commerce. The resulting discrimination against interstate commerce creates a constitutional flaw in Florida's taxing scheme.

Appellant has raised the following substantial federal questions:

1. Whether Florida's district court of appeal can create an exception to the internal consistency test promulgated by this Court that applies on a per se basis to intangible property taxes.

2. Whether a tax which has multiple bases for application and which potentially subjects intangible property owners engaged in interstate commerce to double taxation violates the internal consistency doctrine.

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CONSENT OF THE PARTIES

Both Ford Motor Credit Company, Appellant and the State of Florida, Department of Revenue, Appellee, have consented to Amici Curiae participating in these proceedings. Their consents have been filed with this Court.

INTERESTS OF AMICI CURIAE

Caterpillar Inc. ("Caterpillar") is a Delaware corporation with its principal place of business in Peoria, Illinois. It is a multinational company which is engaged in the design, manufacturing and sale of earth moving, construction, and material handling equipment. Caterpillar engages in these business activities in numerous countries and states, including Florida. In the course of such activities, Caterpillar sells its equipment on open account, and thereby creates intangible assets used in interstate commerce. As a result, Florida has subjected Caterpillar to its tax on intangibles. Caterpillar is currently protesting the imposition of this tax in an administrative proceeding before the Florida Department of Revenue. The issues before this Court have been raised by Caterpillar in its administrative proceeding, and the outcome of that proceeding will be directly affected by the outcome of this appeal.

Clark Equipment Company ("Clark") is a Delaware corporation with its principal place of business in South Bend, Indiana. It is a multinational company engaged in the design, manufacture and sale of equipment to move materials, systems to transfer power, and products for industrial application. Clark engages in these activities in

numerous foreign countries and states, including Florida. In the course of such activities, Clark finances certain purchases and therefore creates various intangible assets used in interstate commerce. As a result, Florida has subjected Clark to its tax on intangibles, and its tax liability to the State of Florida will be directly affected by the outcome of this appeal.

Clark Equipment Credit Corporation ("Clark Credit") is a Michigan corporation with its principal place of business in Buchanan, Michigan. It is engaged in the financing of wholesale and retail sales of equipment in numerous states, including Florida. These activities result in the creation of various types of intangible assets used in interstate commerce. Accordingly, Florida has subjected Clark Credit to its tax on intangibles. Clark Credit is currently litigating the imposition of Florida's intangible property tax in *Clark Equipment Credit Corp. v. Dept. of Revenue, State of Florida*, Case No. 86-794 (Fla. 2d Cir. Ct.), and the issues now before this Court have been raised in that litigation. As a result, the outcome of this proceeding will affect Clark Credit's pending litigation.

CSX Transportation, Inc. ("CSXT") is a Virginia corporation with its principal place of business in Baltimore, Maryland. It is a common carrier by rail and operates a railroad system in 19 states, including Florida, and the District of Columbia, and Canada. As a result of such activities, intangible assets are created which are used in interstate commerce. Accordingly, Florida has subjected CSXT to its tax on intangibles. CSXT has disputed the application of Florida's intangible tax to its intangibles and is currently litigating certain aspects of Florida's intangible property tax in *CSX Transportation, Inc. v.*

Department of Revenue, State of Florida, Case No. 87-137 (Fla. 2d Cir. Ct.) and *CSX Transportation, Inc. v. Department of Revenue, State of Florida*, Case No. TCA 88-40132 (N.D. Fla.). The outcome of this appeal will affect CSXT's pending litigation.

General Motors Acceptance Corporation ("GMAC"), a wholly owned subsidiary of General Motors Corporation, is a New York corporation with its principal place of business in Detroit, Michigan. It is engaged in the financing of wholesale and retail sales of vehicles manufactured by General Motors Corporation in numerous states, including Florida. These activities result in the creation of intangible assets used in interstate commerce. Accordingly, Florida has subjected GMAC to its tax on intangibles. GMAC is currently litigating the imposition of this tax in *General Motors Acceptance Corp. v. Comptroller and Dept. of Revenue, State of Florida*, Case No. 86-2526 (Fla. 2d Cir. Ct.) and the issues now before this Court have been raised in that litigation. As a result, the outcome of this proceeding will affect GMAC's pending litigation.

General Motors Corporation ("GM") is a Delaware corporation which maintains its principal place of business in Detroit, Michigan. It is a multinational company engaged in the design, manufacturing, and sale of vehicles. GM engages in these business activities in numerous countries and states, including Florida. In the course of such activities, GM engages in various types of financing activities. These business activities result in the creation of intangible assets used in interstate commerce. As a result, Florida has subjected GM to its tax on intangibles, and its tax liability to Florida will be directly affected by the outcome of this appeal.

Amici are extensively engaged in interstate commerce and are subject to a variety of taxes imposed by numerous states and localities. In addition to this particular appeal, Amici have a strong interest in protecting interstate commerce from discriminatory and unduly burdensome state and local taxation. Specifically, Amici are subject to numerous taxes based upon their intangible property and are concerned that their intangible property will be subjected to multiple tax burdens. The Court's disposition of this appeal will not only directly affect the pending actions of Amici, but will also affect the future development of state and local tax practices in a manner which will have a far-reaching, long-term effect on activities engaged in by Amici.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The applicable provision of the Constitution of the United States of America is:

> The Congress shall have Power . . . To regulate Commerce . . . among the several States . . .

U.S. Const. art. I, § 8, cl. 3.

The relevant Florida statute is Fla. Stat. § 199.112(1) (1983), which provided:

> (1) All bills, notes or accounts receivable, obligations, or credits, wheresoever situated, arising out of, or issued in connection with, the sale, leasing, or servicing of real or personal property in the state are subject to taxation under this chapter, it being the legislative intent to provide that such intangibles shall be assessable regardless of where they are kept, approved as to their creation, or paid. This provision

> shall apply to any person representing business interests in the state that may claim a domicile elsewhere, the intent further being that no nonresident, either by himself or through an agent, transact business in the state without paying the same tax which the state would impose on residents transacting the same business. Sales of tangible personal property are in this state if the property is delivered or shipped to a purchaser within this state, regardless of the f.o.b. point or other conditions of the sale. The provisions of this section shall in no way be construed to alter the tax status of intangibles not connected with the sale, leasing, or servicing of real or personal property in the state.[1]

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The principal issue before this Court is whether Florida's intangible tax system violates the Commerce Clause of the United States Constitution. The answer to this question involves a determination of whether the Commerce Clause applies to intangible assets created and used in interstate commerce and whether the internal consistency test used by this Court to resolve Commerce Clause challenges applies to intangible personal property taxes.

The Appellant, Ford Motor Credit Company ("Ford Motor Credit"), has filed its Jurisdictional Statement in this appeal. This brief is in support of Ford Motor Credit's position and should be considered in conjunction with Appellant's Jurisdictional Statement which is

[1] Fla. L. 85-342 (1985) repealed § 199.112, Fla. Stat. (1983), but created § 199.175, Fla. Stat. (1987), which incorporated in, a substantially similar form the provisions of former § 199.112.

adopted by Amici Curiae. In order to avoid unnecessary repetition, Amici have not duplicated certain arguments contained in Appellant's Jurisdictional Statement.

Florida's First District Court of Appeal ("DCA") held that the internal consistency test used by this Court to analyze Commerce Clause challenges does not apply to Florida's intangible tax. *Ford Motor Credit Co. v. Department of Revenue, State of Florida*, 537 So.2d 1011, 1013 (Fla. 1st DCA 1988), *review denied*, ___ So.2d ___ (Fla., Feb. 22, 1989). This holding conflicts with applicable decisions of this Court.

If allowed to stand, the DCA's decision, and similar decisions by other state courts, will substantially curtail this Court's efforts to establish a consistent and rational analysis (i.e., the internal consistency test) to determine whether a state tax impermissibly burdens or discriminates against interstate commerce. A refusal by states to utilize the internal consistency test as part of their analysis in resolving Commerce Clause challenges will have a material and adverse impact on taxpayers engaged in interstate commerce and provide different standards for evaluating the constitutionality of different types of state taxes. The present need of the various states for revenue, the evolving complexity of their taxing schemes, and the extent of modern day interstate commerce will heighten the severity of such an adverse impact.

The DCA, while acknowledging discrimination against interstate commerce is prohibited, refused to apply the internal consistency test to the tax in question and, as a result, found that Florida's taxing scheme did not violate the Commerce Clause. *Id.* at 1013. Although

the DCA stated that its refusal to apply the internal consistency test was based on a distinction between property taxes and excise and income taxes, its holding is based, in part, upon a finding that interstate commerce is not involved. The DCA found that "[t]he contested intangible tax in the present case is not integrally related to interstate commerce . . . " *Id.* at 1012. In reaching this result, the DCA failed to address the obvious differences between the ad valorem taxation of intangible assets which arise from the financing of sales made in interstate commerce and the ad valorem taxation of property which is physically located in a particular state.[2]

Florida's intangible tax at issue is imposed in three separate circumstances: (1) when the owner of the intangible has a Florida domicile;[3] (2) when the sale which gives rise to the intangible is a Florida sale; and (3) when the sale which gives rise to the intangible results in a delivery of property to Florida. In this latter circumstance, the Florida scheme establishes a tax situs through creating a presumption of a Florida sale regardless of where the sale

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[2] *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981), rejected the argument that a state could focus solely upon a single intrastate activity and evade the Commerce Clause's application. 453 U.S. at 617. Today, the Commerce Clause may be implicated if the local activity involves goods which may eventually enter into interstate commerce.

[3] Although Florida's statute, Section 199.112(1) (1983), Florida Statutes, does not appear on its face to directly address the issue of Florida's taxation of all intangibles owned by Florida domiciled taxpayers, Florida does tax such intangibles. Furthermore, Florida's taxation of such intangibles is not in dispute. *Ford Motor Credit*, 537 So.2d at 1012, *citing Florida Steel Corp. v. Dickinson*, 328 So.2d 418 (Fla. 1976).

actually occurs. The imposition of the tax is triggered by any one of these circumstances and is applied to the outstanding balance of such intangibles as of January 1 of each year.

If other states adopted Florida's taxing scheme, non-Florida domiciled taxpayers engaged in interstate commerce in Florida would be subject to taxation on their intangibles in their state of domicile, in the state in which the sale generating the intangible actually occurs, and in the state where the property is delivered. Because of this multiple taxation of the same intangibles, taxpayers which only engage in intrastate commerce will be provided an economic advantage over those engaged in interstate commerce.

A review of Florida's taxing statute demonstrates that the intangibles generated from sales by non-domiciled taxpayers are involved in interstate commerce. By utilizing a tax scheme which would establish a tax situs for intangibles in multiple states, Florida acknowledges that such intangibles are not discrete assets which are physically located in a particular state but are rather a part of the flow of interstate commerce. Florida's statute determines the tax situs of intangibles owned by non-domiciled taxpayers by reference to the original location of the activities from which the intangibles arise, such as the sale, leasing, or servicing of property. The usual ad valorem property tax system, unlike Florida's tax scheme, makes no distinction as to where the property is created, but focuses on the location of the property at the date such an annual ad valorem tax is imposed. Florida taxes intangibles regardless of where they are located on the annual assessment date.

Furthermore, Florida specifically excludes certain of the actual characteristics of the intangibles from the determination of the location of the business situs of the intangibles, i.e., " . . . where they are kept, approved as to creation, or paid." Fla. Stat. § 199.112(1) (1983). By taking this approach, Florida seeks to make the domicile of the owner of the intangible, the place of sale, or the location of the purchaser at the time of delivery of property the only relevant factors in determining the annual tax situs of any resulting intangible. This approach demonstrates that these intangibles are a part of interstate activities and that to establish a tax situs in Florida, a number of characteristics pertinent to determining the actual location of an intangible must be eliminated from consideration in order to achieve the result desired by Florida.

In *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), this Court found that interstate commerce was not immune from state taxation. A four-prong test was developed which required that an activity subject to tax have a substantial nexus to the taxing state, that the tax be fairly apportioned, that the tax not discriminate against interstate commerce, and that the tax be fairly related to the services provided. *Id.* at 279.

In *Container Corporation of America v. Franchise Tax Board*, 463 U.S. 159 (1983), the Court, applying *Complete Auto* to California's corporate unitary taxing scheme, articulated the "internal consistency" inquiry requiring that a state's taxing scheme be "fair." By fair, the Court stated "the formula must be such that if applied by every other jurisdiction, it would result in no more than all of the unitary business' income being taxed." *Id.* at 169.

In support of its conclusion that the internal consistency test does not apply to property taxes, the DCA cited cases decided before *Container Corporation*, the progenitor of the internal consistency test. *Ford Motor Credit*, 537 So.2d at 1013. Although these pre-*Container* cases do contain certain distinctions between property taxation and excise and income taxation, these distinctions were not made in a context which would support the proposition that the internal consistency test is not part of modern day Commerce Clause analysis.[4]

In *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 443-46 (1980), the contention was rejected that there was something talismanic about the taxation of intangibles that immunized dividends from the application of the apportionment prong of *Complete Auto*. Noting that the theories of taxation by apportionment and taxation by allocation to a single situs are theoretically incommensurate, the Court stated that the theory of taxing property at a single situs no longer applies when the taxpayer's activities involve relations with more than one state. *Id.* at 445, *citing Curry v. McCanless*, 307 U.S. 357 (1939).

Contrary to the DCA's holding, the principle to be gleaned from *Mobil Oil* is not that differences continue to exist between property and other forms of taxation, but rather that, absent exceptional circumstances, taxation of

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[4] A Commerce Clause analysis is required for evaluating Florida's intangible property tax. *See Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979), where the Commerce Clause analysis requirements of *Complete Auto* were applied in evaluating the constitutionality of an ad valorem taxing system.

property involved in interstate commerce is to be by apportionment, rather than by allocation to a single situs.

In *Pullman's Palace Car v. Commonwealth of Pa.*, 141 U.S. 18 (1891), this Court characterized a tax on the capital of a corporation as a tax on the corporate property within the taxing state. The Court then proceeded to uphold the tax on a nondomiciled railroad because the tax was fairly apportioned. *Pullman* stands for the proposition that intangible taxes such as a tax on a corporation's capital stock must be apportioned if the intangible is a part of interstate commerce.

In both *Mobil* and *Pullman's Palace*, this Court was faced with the question of the constitutionality of the imposition of a tax on instrumentalities of interstate commerce prior to *Container Corporation*. Any distinctions in these cases between property and income taxes should have no impact on this Court's current application of the Commerce Clause or the internal consistency test to property which is part of interstate commerce.

The DCA also cited dissenting opinions by Justice O'Conner and Justice Scalia in *American Trucking Assn., Inc. v. Scheiner*, 483 U.S. 266 (1987), and Justice Scalia in *Tyler Pipe Industries, Inc. v. Washington Department of Revenue*, 483 U.S. 232 (1987), in support of its conclusion that there was no suggestion in this Court's internal consistency cases that this Court would be inclined to set aside a long-standing distinction between property taxes and excise or income taxes or apply the internal consistency test in an intangible property tax context. These dissenting opinions, however, object to this Court's use of an

internal consistency test. Contrary to the DCA's conclusion, these dissenting opinions indicate that the majority of this Court would not follow pre-*Container* cases in analyzing Commerce Clause challenges to state taxes.

Since this Court articulated the internal consistency test, it has consistently held that the internal consistency test is an integral part of any Commerce Clause analysis under *Complete Auto*. *See Goldberg v. Sweet*, ___ U.S. ___, 109 S.Ct. 582 (1989); *D.H. Holmes Co., Ltd. v. McNamara*, ___ U.S. ___, 108 S.Ct. 1619 (1988); *American Trucking Assn., Inc. v. Scheiner; Tyler Pipe Industries, Inc. v. Washington Department of Revenue; Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984). This Court has never indicated an intention to restrict the internal consistency test to "nonproperty" taxes. There is no basis for the DCA's conclusion that internal consistency does not apply to a Commerce Clause analysis of an intangible tax such as Florida's.

The need to review the internal consistency of a tax scheme is as applicable to Florida's intangible tax as it was to West Virginia's gross receipts tax in *Armco, Inc. v. Hardesty*. A gross receipts tax such as the one addressed in *Armco* has no greater burden on interstate commerce than does a tax on the intangibles which represent those gross receipts. The economic reality of Florida's tax is that it does not impose a tax on property located exclusively in Florida, but on gross receipts which are financed and which are from Florida sales made by nondomiciled taxpayers or from all sales made by domiciled taxpayers. This Court has stated that the analysis of a state tax should be based on the economic substances of the tax. *Complete Auto*, 430 U.S. at 288. Even more egregious than the West Virginia tax, the Florida tax is an annual, value

based tax where the intangibles derived from a single transaction will be taxed repeatedly until paid.

The DCA erroneously relied on a due process analysis and not on a Commerce Clause analysis in reaching its conclusion that the taxing scheme does not discriminate against interstate commerce. In support of its due process analysis, the DCA cited to *State Tax Commission of Utah v. Aldrich*, 316 U.S. 174 (1942) and *Curry v. McCanless*, 307 U.S. 357 (1939). While admitting that those cases involve only due process challenges, the DCA found little reason to doubt their application since a tax which will " . . . satisfy the due process clause generally will satisfy the commerce clause." 537 So.2d at 1012.

Contrary to the DCA's holding, the Commerce and the Due Process Clauses are not synonymous and a tax which satisfies Due Process Clause does not per se satisfy all the elements of the Commerce Clause. Specifically, the apportionment and discrimination prongs of *Complete Auto* must also be satisfied. *See Goldberg v. Sweet*, 109 S.Ct. at 588. Moreover, *Curry* and *Aldrich* involve, at most, nexus and benefit issues, the first and fourth prongs of the *Complete Auto* test. To the extent those cases involve apportionment and discriminatory issues, they are superseded by this Court's decision in *Complete Auto*.

This Court noted in *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979), that, prior to *Complete Auto*, the theory of property taxation was through allocation of the full value to the domicile of the owner, but that theory is no longer used and property involved in interstate commerce is now to be taxed according to the rule

of fair apportionment and nondiscrimination. 441 U.S. at 442.

The DCA's decision is in conflict with existing decisions of this Court by failing to apply *Complete Auto, Container Corporation,* and their progeny. Florida has carved out an exception to the Commerce Clause in violation of this Court's previous holdings. This raises substantial federal questions requiring this Court to resolve, once again, " . . . the limits that the Commerce Clause places on the taxing power of the states." *Boston Stock Exch. v. State Tax Comm'n.*, 429 U.S. 318, 329 (1977).

CONCLUSION

For the reasons set forth above, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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